(3)

No. 90-338

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM H. COFFEY
Petitioner,

v.

PSLJ, INC.
Respondent.

REPLY AND SUPPLEMENTAL BRIEF TO THE OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Steven R. Himelfarb
(Counsel of Record)
Sheeskin, Hillman & Lazar, P.C.
6110 Executive Boulevard
Suite 1070
Rockville, Maryland 20847
(301) 770-6730

Of Counsel:

Herbert A. Terrell
Speights & Micheel
1029 Vermont Avenue, N.W.
4th Floor
Washington, D.C. 20005
(202) 872-8100

STATEMENT OF ISSUES IN REPLY TO OPPOSITION TO THE PETITION

1. The Court should grant review to resolve a conflict among the respective federal circuits pertinent to the administration of bankruptcy appeals and to cure a departure, by the Fourth Circuit of Appeals, from the majority view regarding Bankruptcy Rule 8001 and Rule 8009.

2. Whether purported evidence of bad faith or negligence of a party and during the entire course of protracted litigation, has any bearing on whether, during the isolated course of a single appeal, a party has acted to not abide by the appellate rules.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

William H. Coffey, Petitioner, by his attorneys, hereby submits the within Reply and Supplemental Brief to the Opposition to the Petition seeking discretionary review.

OPINION BELOW

The opinion of the United States Court of Appeals, Fourth Circuit, (Appendix to Petition, *infra*, pp. 1-3), was not reported.

JURISDICTION

The judgment of the Court of Appeals (Appendix, p. 1, *et seq.*), after Rehearing In Banc, was denied, was entered on May 24, 1990 and June 20, 1990 respectively. The jurisdiction of this Honorable Court is invoked pursuant to the Judicial Code, 28 United States Code, Section 1254(1) and Section 2101(c). The instant reply and supplemental brief is filed pursuant to Supreme Court Rule 22.5 and 22.6.

STATUTORY PROVISIONS INVOLVED

Pub.L. 88-623, Section 1, October 3, 1964, 78 Stat. 1001, as amended, 28 United States Code Section 2075 provides:

> The Supreme Court shall have the power to

whereas, in another federal circuit, a mere week would result in a draconian dismissal of the appeal, without regard to the loss of potentially half a million dollars in claims.

3. The opposition to the Petition sets forth specific instances, beginning in 1986, and makes reference to incidents during the litigation on January 30, 1989, March 13, 1989, and August 20, 1990. (Opposition pp. 2-5). The only references by Respondent as to why the lower court decisions should be affirmed are the objective representations that the Bankruptcy Court prepared an abstract outline of the trial and hence militating against the need for a verbatim transcript, and, that the Bankruptcy Rule expressly provided for dismissal. Several truisms exist here. If the record on appeal is not complete, a party has a right to add or supplement the record. The Court of Appeals agreed (Respondent, Appendix). Second, no

reported decision exists allowing a federal appeals court to consider the record of three (3) separate but related cases inclusive of an appeal and spanning four (4) years to determine if a party during the limited appeals period (15 days here) has failed to prosecute. Finally, the inclusion of references to sanctions imposed upon a former counsel, an unrelated finding of contempt, and misleading references to appellate court orders are scandalous and impertinent.

REASONING IN SUPPORT OF PETITION

1. The Respondent is simply wrong to assert that Bankruptcy Rules 8001 and 8009 explicitly require dismissal for inability to file a brief. No automatic rule of dismissal exists. Respondent urges the Court to accept the view that the Fourth Circuit decision here was the product of, or due to fault of Petitioner and his counsel, *without regard to the rules and judicial interpretation of same*. No federal circuit court has

adopted such a rule or read the language of the pertinent rules to require the results reached below. The decision of *Greco v. Stubenberg*, 859 F.2d 1461 (9th Circuit 1988), and the lower court decision of *In re WHET, Inc.*, 19 B.R. 1022 (1st Cir. BAP. 1982), are not controlling authorities in the Ninth Circuit, *In re Hill*, 775 F.2d 1385 (9th Cir. 1985), nor in the First Circuit, *Cournoyer v. Lincoln*, 53 B.R. 478 (D.R.I. 1985), *affd.*, 790 F.2d 971 (1st Cir. 1986).

2. Aside from a discussion of the years of litigation engendered by the cases below, Respondent does not address how during the twenty-two (22) days following the docketing of the appeal, Petitioner acted in bad faith and was indifferent or negligent. The Respondent nowhere states how it has or was prejudiced, see *Cournoyer v. Lincoln, ante*, (five months in the absence of prejudice and brief not deemed untimely).

NATIONAL SIGNIFICANCE OF CASE

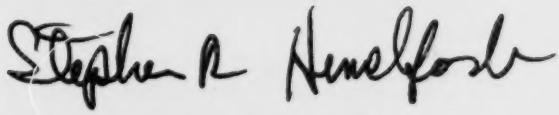
The Fourth Circuit Court of Appeals has no reported decision pertinent to the interpretation of Rule 8001 and Rule 8009. Each of the other federal circuits, in one fashion or the other, follows the tests set forth by the Sixth Circuit, *In re Winner, ante*. Other circuits have furthered the governing tests within their circuits by requiring a fault analysis, and by a rule which considers prejudice to the opposing party, whether the brunt of the sanction of dismissal should fall upon the attorney or his client, and which considers actual bad faith. Uniformity can only be established by this Court acting here. This Court has acted in the past to clarify and provide guidance in the special area of bankruptcy practice, *Maggio v. Zeitz*, 333 U.S. 56 (1948). Indeed, certiorari has been granted to consider the effect of procedural rules upon practice in the lower courts,

Sibach v. Wilson, 312 U.S. 1 (1941), *Reading Co. v. Brown*, 391 U.S. 471 (1968).

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,



Steven R. Himelfarb
Sheeskin, Hillman & Lazar, P.C.
6110 Executive Boulevard
Suite 1070
Rockville, Maryland 20847
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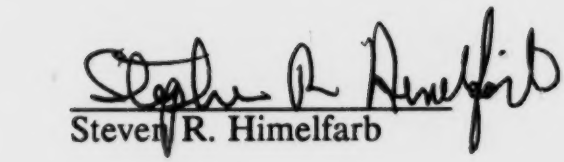
Of Counsel:

Herbert A. Terrell
Speights & Micheel
1029 Vermont Avenue, N.W.
4th Floor
Washington, D.C. 20005
(202) 872-8100

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded, this 1st day of October, 1990, by first-class mail, a copy of the foregoing Reply and Supplemental Brief to the Opposition to the Petition for Writ of Certiorari, by the following parties of record:

Curtis C. Coon, Esquire
Sandon Cohen, Esq.
Cohan & Francomano
20 South Charles Street
12th Floor
Baltimore, MD 21201



Steven R. Himelfarb